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No. 84-1258

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CHEMICAL BANK AND WASHINGTON PUBLIC POWER SUPPLY SYSTEM,

Petitioners,

v.

PUBLIC UTILITY DISTRICT NO. 1 OF BENTON COUNTY, WASHINGTON, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Washington

COLUMBIA RESPONDENTS' OPPOSITION TO UNDERWRITERS' AND PUBLIC SECURITIES ASSOCIATION'S MOTIONS FOR LEAVE TO FILE BRIEFS *AMICUS CURIAE*

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April 5, 1985

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

This is submitted on behalf of the following respondents, which for convenience are referred to collectively as the "Columbia Respondents" or "these respondents":

Columbia Rural Electric Association, Inc.

Blachly-Lane County Cooperative Electric Association

Central Electric Cooperative, Inc.

Columbia Basin Electric Cooperative, Inc.

Consumers Power, Inc.

Coos-Curry Electric Cooperative, Inc.

Douglas Electric Cooperative, Inc.

Hood River Electric Cooperative

Lane Electric Cooperative, Inc.

Midstate Electric Cooperative, Inc.

Salem Electric

Umatilla Electric Cooperative Association

Wasco Electric Cooperative, Inc.

Kootenai Electric Cooperative, Inc.

Fall River Rural Electric Cooperative, Inc.

Lost River Electric Cooperative, Inc.

Raft River Rural Electric Cooperative, Inc.

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COLUMBIA RESPONDENTS' OPPOSITION TO UNDERWRITERS' AND PUBLIC SECURITIES ASSOCIATION'S MOTIONS FOR LEAVE TO FILE BRIEFS *AMICUS CURIAE*

This response is submitted pursuant to Supreme Court Rule 42.4 in opposition to (1) the Motion For Leave To File Brief *Amicus Curiae* of Salomon Brothers Inc.; Smith Barney, Harris Upham & Co. Incorporated; Prudential-Bache Securities Inc; and Merrill Lynch, Pierce, Fenner and Smith, Incorporated ("Underwriters") and (2) the Motion For Leave To File Brief *Amicus Curiae* of the Public Securities Association ("Association").

The seventeen respondents submitting this response are listed on the inside front cover. They are rural electric cooperatives located in Washington, Oregon and Idaho and have no parent companies, subsidiaries or affiliates within the meaning of Rule 28.1 of this Court.

Reasons For Denying The Motions For Leave To File *Amicus* Briefs

We are aware that a motion for leave to file an *amicus* brief in support of a petition for certiorari is normally granted notwithstanding Supreme Court Rule 36.1, which provides that such a motion "is not favored." Nevertheless, we urge the Court to deny the Underwriters' and Association's motions in this case, on the ground that their proposed briefs *amicus curiae* so distort the facts and the record that they constitute an abuse of the proper function of an *amicus*.

In their effort to create federal constitutional issues in a case where none exists, the Underwriters and the Association seek permission to tell the Court in their proposed briefs about municipal utilities who borrowed money from bondholders, repeatedly gave assurances of repayment, and

then refused to return the money they borrowed, and about a state supreme court which suddenly breached the rule of *stare decisis*, redefined state law and held that the bondholders were not entitled to repayment on their bonds. Such a tale has no similarity to the facts of this case.

Here, the participant utilities did not issue the bonds, WPPSS did; the participants did not receive any part of the bond sale proceeds, WPPSS did; the participants made no representations about their authority to the bondholders and gave the bondholders no assurances of repayment, WPPSS and its bond counsel did; and because the participants received no money or anything else of value from either the bondholders or from WPPSS in connection with the two failed nuclear projects, the participants have nothing to "return" to the bondholders.

WPPSS was not "conceived, designed, and employed as nothing more than a conduit on behalf of, and for the convenience of, the participants." (Association Brief at 12). WPPSS was established in 1957, had completed a hydroelectric project and a nuclear generating plant in the 1960s, and had already undertaken the construction of three other nuclear projects, with financial backing from the Bonneville Power Administration, long before 1976 when the Participants' Agreement from Projects 4 and 5 was signed. WPPSS employed more technical and administrative personnel on its own staff than some of the rural and small-town participants had ratepayers.

Despite all the invectives they hurl at the Washington Supreme Court, nowhere do the Underwriters or the Association cite any prior Washington decision which was overruled, either expressly or implicitly, by the court in reaching the two decisions that, *amici* would tell this Court, so drastically changed state law. Moreover, the Washington

Supreme Court did not invalidate the bonds or deprive the bondholders of their right to receive payment from WPPSS; rather, the court held unenforceable, under longstanding principles of Washington law, the power supply agreement between the participant utilities and WPPSS. Neither WPPSS nor any Washington court has ever suggested that WPPSS is not fully liable to the bondholders on the bonds WPPSS issued.

Zealous advocacy is one thing; distorting the facts and mischaracterizing the record is quite another. Neither is appropriate for an *amicus curiae*. As one court has stated,

> "an *amicus curiae* is an impartial individual who suggests the interpretation and status of the law, gives information concerning it, and whose function is to advise in order that justice may be done, rather than to advocate a point of view so that a cause may be won by one party or another . . . . Indeed, if the proffer comes from an individual with a partisan, rather than impartial view, the motion for leave to file an *amicus* brief is to be denied, in keeping with the principle that an *amicus* must be a friend of the court and not a friend of a party to the cause."

Leigh v. Engle, 535 F.Supp. 418, 420 (N.D. Ill. 1982). Another court has pointed out that an *amicus* is one who for the assistance of the court gives information on some matter of law, not one who gives a "highly partisan" account of the facts. *New England Patriots Football Club, Inc. v. University of Colorado*, 592 F.2d 1196, 1198 n.3 (1st Cir. 1979). By those standards, neither the Underwriters nor the Association qualifies as an *amicus curiae* in this case.

We urge the Court to send a signal to the bar that the role of *amicus curiae* should not be abused as the Underwriters

and the Association would abuse it here. Their motions for leave to file *amicus* briefs should be denied.

Respectfully submitted,

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